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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1044

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA WHITLOCK RIGG (FORMERLY GEORGIA M. WHITLOCK), EXECUTRIX AND GEORGIA WHITLOCK RIGG (FORMERLY GEORGIA M. WHITLOCK),

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, AND HONORABLE BRUCE M. FORRESTER, JUDGE, UNITED STATES TAX COURT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA WHITLOCK RIGG (FORMERLY GEORGIA M. WHITLOCK), EXECUTRIX AND GEORGIA WHITLOCK RIGG (FORMERLY GEORGIA M. WHITLOCK),

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, AND HONORABLE BRUCE M. FORRESTER, JUDGE, UNITED STATES TAX COURT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners petition for writ of certiorari to review judgment of the United States Court of Appeals for the Tenth Circuit in this case in both dockets 75-1919 (Appeal), and 76-1021 (Mandamus Action) below.

OPINION BELOW

The opinion of the United States Court of Appeals in the Commissioner's Appeal, Docket No. 75-1919, and in mandamus action, Docket No. 76-1021 (App. A) was filed on December 13, 1976 and is reported at ____ F. 2d____.

JURISDICTION

Judgment of the Court of Appeals was entered on December 13, 1976 (App. B). Petitions for Rehearing by Court en Banc and for Recall of Mandate, timely filed, were denied by Court of Appeals on December 29, 1976 (App. C). Jurisdiction of this Court is invoked under Title 28, U.S.C. 1254(1). Issuance of the lower Court's judgment and mandate does not defeat the jurisdiction of the Supreme Court to review the lower Court's judgment (Carr v. Zaja, 283 U.S. 52, 53, 55 S. Ct. 360; Aetna Casualty Co. v. Flowers, 330 U.S. 464, 467, 67 S. Ct. 101).

QUESTIONS PRESENTED

1. Were writ of mandamus to Honorable Bruce M. Forrester, Judge, United States Tax Court and dismissal of the Commissioner's appeal improvidently ordered by reason of the fact that: (1) Petition for writ of mandamus was untimely filed on or about January 19, 1976, more than 30 days after entry of Tax Court judgment entered on October 9, 1975, with the Tax Court judgment having become final on

November 8, 1975 under Section 7481(a)(3)(B)(iii) IRC 1954; and (2) Mandamus may not be resorted to for purpose of reviewing on appealable decision of record?

2. In all events, was the order, in said writ of mandamus, to Honorable Bruce M. Forrester, Judge, United States Tax Court, Retired, to impose a federal income tax on petitioners below in Tax Court under Section 951(a) IRC 1954 unlawful and manifestly unjust by reason of companion Sections 951(c) and (d) IRC 1954?

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional provisions, statutes and regulations involved are primarily (App. L - to extent not set out in Statement):

Issue 1. Section 7481(a)(3)(B)(iii) IRC 1954.

Issue 2. Article 1, Section 8, Clause 1, U.S. Constitution, Sections 951(a), companion Sections 951(c) and (d), Section 551(b), of Internal Revenue Code of 1954, found in Title 26, U.S. Code, along with regulations 1.951-2, 1.951-3, 26 C.F.R.

STATEMENT

The original case was tried in the United States Tax Court (sometimes hereinafter referred to as Tax Court), opinion being found in Estate of Whitlock, et al v. Commissioner, 59 T.C. 490. The facts as stipulated and found by the Tax Court in said case showed that during years 1964, 1965 and 1967, Leonard E. Whitlock and Georgia M. Whitlock were husband and wife, residing in Stafford, Kansas. Leonard died on October 11, 1967, a resident of Kansas, and his estate is being administered with Georgia M. Whitlock (now Georgia Whitlock Rigg) as Executrix. Taxpayers, while living, filed joint federal income tax returns and after Leonard's death Georgia filed a joint federal income tax return for taxable year 1967 for her deceased husband and herself as an individual. The returns were filed on a cash basis method of reporting.

Whitlock Oil Services, Inc., sometimes referred to as Oil Services, was a foreign corporation (incorporated in Panama). Leonard and Georgia, as joint tenants, owned all the stock of Oil Services in 1964 and until, in the first half of 1965, Leonard relinquished all interest in the stock to Georgia, who thereafter held all the stock of Oil Services. During the years involved Oil Services held investments in United States property acquired after January 1, 1963, and at the same time had earnings and profits accumulated primarily and essentially prior to January 1, 1963, and not during the years involved, which were sufficient so that they did not limit the amounts, if any,

otherwise includible in Leonard and Georgia's gross income under Section 951 (a) of the internal Revenue Code of 1954, Title 26 U.S. Code (referred to herein as IRC 1954), if such section is to be applied. The record does not show the financial status of the parties petitioner, but it is understood that the Estate of Leonard, while still pending in Probate Court in Kansas, is insolvent, and that the burden of the tax liability being sought is on Georgia, with the claimed liability being at or in excess of a quarter of a million dollars including interest. Georgia was a widow from 1967 until early in 1975 when she married John Rigg, also of Stafford, Kansas.

Oil Services, above, during 1964, 1965 and 1967 was a foreign personal holding company, as to which its shareholders were found subject to tax under Section 551 (b) IRC 1954 for years 1964, 1965 and 1967.

In general, the statutory framework of Internal Revenue Code does not reach out to tax foreign-source income a foreign corporation such as Oil Services. However, where such a corporation is controlled by U.S. interests, the corporation's U.S. shareholders may, under the technical reading of two different parts of the Internal Revenue Code, be obliged to include all or part of the foreign corporation's income and earnings as their own. Foreign holding company provisions of Section 551 (a) and (b) IRC 1954, by their reading, require shareholders of a foreign personal holding company to include in their taxable U.S. income their pro-rata share of undistributed foreign personal holding company income of

such corporation. Further, the controlled foreign corporation provisions of Sections 951 IRC 1954 et sequitur, sometimes loosely referred to as Subpart F, defines several areas where a foreign corporation's income may be attributed to its U.S. shareholders.

The area, with which this litigation has been specifically involved, among others, is the area of inclusion covered by Section 951 (a)(1)(B) IRC 1954. This provision requires a United States person, who owns 10% or more of a total combined voting power of all classes of stock of a controlled foreign corporation on the last day of the corporation's tax year, to include in his gross income his pro-rata share of the corporation's increase in its earnings invested in U.S. property by the corporation. The tax, under this provision, is imposed on the U.S. shareholder's pro-rata share of corporation's increase in its earnings invested in U.S. property by the corporation for the entire year, and a computation of amount of those earnings invested is made as of the end of the year, to extent that amount would have constituted a dividend if it had been distributed. The share of the U.S. stockholder in earnings so invested is determined on basis of stock owned by the shareholder on last day of the tax year.

Under the factual circumstances of the case, as found by the Tax Court in 59 T.C. 490, Oil Services shareholders were subject to tax under Section 551 (b) IRC 1954 related to foreign personal holding companies for 1964, 1965 and 1967. Said shareholders

were also under the provisions of Section 951 (a) IRC 1954 subject to tax on earnings and profits of Oil Services for earlier years because of increase in investments in U.S. property by Oil Services. However, Section 951 (a) is not the whole story. Sections 951 (c) and (d) IRC 1954 are companion specific subsections under the general Section 951 (a) which imposes the tax. These two companion specific subsections, i.e., 951 (c) and (d), are designed to deal specifically with two different types of corporations, i.e. certain foreign investment companies, and foreign personal holding companies. These two companion sections are treated as specific exceptions to the general rule of application of the tax outlined in Section 951 (a) and read as follows:

"(c) Coordination with Election of a Foreign Investment Company to Distribute Income. - A United States shareholder, who, for his taxable year, is a qualified shareholder (within the meaning of section 1247 (c)) of a foreign investment company with respect to which an election under Section 1247 is in effect shall not be required to include in gross income, for such taxable year, any amount under subsection (a) with respect to such company." (Emphasis added.)

"(d) Coordination with Foreign Personal Holding Company Provisions. - A United States shareholder who, for his taxable year, is subject

to tax under section 551 (b) (relating to foreign personal holding company income included in gross income of United States shareholders) on income of a controlled foreign corporation shall not be required to include in gross income, for such taxable year, any amount under subsection (a) with respect to such company." (Emphasis added)

Consistent with the limitations of his power, which is to interpret statutes which are not clear, and not to legislate, add to, or expand statutes, the Commissioner of Internal Revenue issued his Regulation 1.951-2 (26 C. F. R.), interpreting Section 951 (c) IRC 1954, as follows:

"A United States shareholder who for his taxable year is a qualified shareholder (within the meaning of section 1247 (c)) of a foreign investment company with respect to which an election under section 1247 (a) and the regulations thereunder is in effect for the taxable year of such company which ends with or within such taxable year of such shareholder shall not be required to include any amount in his gross income for his taxable year under paragraph (a) of #1.951-1 with respect to such company for that taxable year of such company." (Emphasis added).

However, inconsistent with the limitations on his power, which is to interpret statutes

which are not clear, the Commissioner assumed the power to interpret Section 951 (d) IRC 1954 in a manner contrary to the specific command of Section 951 (d), which set a limit on his power, by issuing a regulation in #1.951-3, Example (5) (App. L), which went beyond the limits of his authority imposed by Section 951 (d), and held that the exception to the application of Section 951 (a), established by Congress in Section 951 (d), applied basically only to the earnings and profits of the controlled foreign corporation for the current tax year of the controlled foreign corporation, rather than the unlimited specific exception established by Congress.

In so exceeding his authority, the Commissioner not only ignored the statute, but ignored the views of the United States Congress, in the form of the Senate Finance Committee, which was aware of what it was doing when it passed Section 951 (d), and stated its views in 1962 C. B. 3, page 944, relating to the meaning of Section 951 (d). The Senate's views were different from those of the House of Representatives, but in conference, after differing versions of the bill were passed, the Senate views found in Section 951 (d) IRC 1954 were adopted. Said Senate views found in 1962 C. B. 3, page 944, are as follows:

"(d) Coordination with foreign personal holding company provisions. - Subsection (d) provides that a United States shareholder who, for his taxable year, is subject to tax under section 551 (b) (relating to foreign personal holding company income included in

gross income of United States shareholders) on income of a controlled foreign corporation is not required to include in gross income, for such taxable year, any amount under subsection (a) with respect to such company. The corresponding provision of the bill as passed by the House (Section 13(b)(1)) amended section 551(b) to provide that the amount of undistributed foreign personal holding company income otherwise required under section 551(b) to be included in gross income of a United States person is reduced by his proportionate share of undistributed personal holding company income included in gross income under subsection 951(a) for the taxable year as his proportionate part of subpart F income of such controlled foreign corporation." (Emphasis added.)

The Bill went to Conference between the House and Senate Conferees. The report of the Conferees on the part of the House and Senate, found in 1962 C.B. 3, pages 1129, 1134, 1135, 1139, makes it clear that the combined House and Senate followed the language and intent of the Senate Finance Committee version related to Section 951(d).

Judge Bruce M. Forrester, speaking for 13 out of 16 Judges of the United States Tax Court in Estate of Whitlock, 59 T.C. 490, in holding the regulation invalid, found in his study of the legislative history of Section 951 that (59 T. C. 490, l.c. 501):

> " * * * There is good evidence that in using the language of Section 951(d), Congress fully intended the result required by a straightforward reading of that language."

The case in the Tax Court (59 T.C. 490) was a multi-issue case involving four different years, 1963, 1964, 1965 and 1967, which in turn involved a statute of limitations issue in 1963; the amount of undistributed personal holding company income taxable to shareholders for 1964, 1965, and 1967; the amount of investments by Oil Services in U.S. property; the issue of the constitutionality of the controlled foreign corporation provisions of the Internal Revenue Code; the issue of whether pre-1963 earnings of Oil Services were to be included in computing the amount of earnings invested in U.S. property attributed to shareholders; and finally the Section 951(d) issue. All of these issues were reduced to a signed total judgment in dollars only, entered by the Tax Court on February 27, 1973, as follows:

> "Pursuant to the opinion of the Court filed December 29, 1972, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is
>
> "ORDERED AND DECIDED: That there are deficiencies in income taxes due from the petitioners for the taxable years 1963, 1965 and 1967 in the amounts of $7,088.87, $6,236.76 and $4,131.32, respectively; and

"That there is an overpayment in income tax for the taxable year 1964 in the amount of $2,204.12, which amount was paid: $302.48 on April 15, 1965, $1,370.83 on May 12, 1965 and $530.81 on February 8, 1967; and for which amounts a claim for refund could have been filed, under the provisions of section 6511(c) of the Internal Revenue Code of 1954, on December 30, 1969, the date of mailing of the notice of deficiency."

Irene F. Scott
Judge

Entered: February 27, 1973"

Thereafter, both the petitioners in the Tax Court and the Respondent, Commissioner of Internal Revenue, filed appeals to the United States Court of Appeals for the Tenth Circuit. Following completion of the formalities before said Court of Appeals, said Court of Appeals handed down its opinion in Estate of Leonard E. Whitlock, Deceased, et al v. Comm'r., 494 F. 2d 1297, the concluding paragraph of which reads as follows (l.c. 1301):

"The decision and judgment of the Tax Court in both cases is reversed as to the application of section 951(d) as above described, and insofar as it voided Treasury Regulation on Income Tax (1954) Code) #1.951-3 (Coordination of

Subpart F with Foreign Personal Holding Company Provisions). The decision of the Tax Court is otherwise affirmed."

Judgment consistent with the opinion was entered by Tenth Circuit Court of Appeals on April 22, 1974 (App. D).

Thereafter the petitioners below sought certiorari in the United States Supreme Court, which certiorari was denied, presumably because the case was a tax case as to which there was no conflict among the Circuit Court of Appeals. The denial of certiorari has no effect on the merits of the case here (Maryland v. Baltimore Radio Show, 338 U.S. 912, 70 S. Ct. 252; U.S. v. Shubert, 348 U.S. 222, 75 S. Ct. 277).

Mandate was issued on November 27, 1974. Mandate consisted of certified copy of the judgment and copy of opinion which are stated by Clerk of the Court of Appeals for Tenth Circuit to constitute mandate of the Court. The judgment reads as above. Neither the opinion nor the judgment contains any remand to the Tax Court.

Following filing of said mandate, Tax Court, by Judge Bruce M. Forrester, entered an order which noted receipt of mandate, and which ordered in part, on March 25, 1975:

"ORDERED that the decision entered by this Court in this case on February 27, 1973 is hereby vacated and set aside. It is further

"ORDERED that counsel for the parties are to submit, pursuant to the aforesaid Mandate, on or before May 9, 1975, any recomputation, stipulation or motion which they may desire desire to be filed. Upon receipt of such documents, the Court will take further action as it deems appropriate."

Responding to order above, Petitioners below in Tax Court filed with Tax Court on or about April 8, 1975 motion to enter decision (App. E) consistent with plain and explicit instructions of Section 951 (d) IRC 1954, or in alternative to hold matter in abeyance pending outcome of litigation in Lovett v. U.S., Docket No. 191-74, Court of Claims, where issue of application of Section 951 (d) IRC 1954 to type of situation involved in Whitlock was and is pending (i.e. the so-called Whitlock issue). Basis for said motion was contention that judgment of Tax Court entered on February 27, 1973 was unitary judgment calling for a single number of dollars of deficiency or overpayment for each year involved, which unitary judgment could not be reversed in part, without a proper remand (see Amalgamated Workers' Union of Virgin Islands v. Hess Oil Co., 478 F. 2d 540 (3d Cir.), point 2, footnote 1; 36 C.J.S. Federal Courts, Par. 301 (18), p. 1347); that there had been a mandate issued by Court of Appeals, but that there had been no remand in correct, technical sense of word, instructing Tax Court to take action in the matter, and that barring issuance of such remand, instructing Tax Court to act in matter, the Tax Court had neither power (Article 1, Section 8, Clause 1 gives the power to tax

only to Congress), and the Tax Court is a constitutional Court - see Hartmen v. Switzer, 376 F. Supp. 486, l.c. 490) nor jurisdiction to alter its original judgment entered, in face of command of Section 951 (d) (which is a companion section to Section 951 (c) IRC 1954).

Further, it was pointed out that in case of Lovett v. U.S., Docket No. 191-74, Court of Claims, at point 35, identical issue was pending, i.e., proper application of Section 951 (d). It was pointed out that based on companion Sections 951 (c) and (d) IRC 1954 that it was anticipated that Court of Claims will be compelled, by reason of plain and specific provisions of Sections 951 (c) and (d), to rule that a taxpayer has no obligation to pay a tax under Section 951 (a) by reason of plain and specific provisions of Section 951 (d), where specified conditions are met. It was pointed out that Court of Claims decisions may be reviewed by the Supreme Court by one of two methods (Title 28, U.S.C. 1255), by writ of certiorari granted on petition of either United States or the claimant, or by certification of any question of law by Court of Claims in a case as to which instructions are desired, upon which certification Supreme Court may give binding instructions; further, that in event of expected view of the Court of Claims (consistent with view of 13 of the 16 Judges of the Tax Court in Whitlock, 59 T.C. 490) contrary to views of Tenth Circuit, that the matter would be transmitted to Supreme Court either for instructions or upon certiorari, and that it would be manifest injustice to enter a final binding judgment against taxpayer in the case pending outcome of litigation in Lovett v. U.S., Docket No.

191-74.

As a result of the motions and oral argument on June 2, 1975 (App. F) before Tax Court, the Tax Court, by Judge Forrester, entered on October 9, 1975 the following order (App. G):

> "On March 25, 1975, we entered an Order herein which, inter alia, ORDERED that the decision entered by the Court on this February 27, 1973 is hereby vacated and set aside.
>
> "It is now
>
> "ORDERED that this Court's order of March 25, 1975 is hereby vacated and set aside."

It seems clear that this order was intended, in light of contents of motion filed by appellees on April 8, 1975, to have Tax Court enter its decision consistent with plain and explicit instructions of Section 951 (d) IRC 1954, to reinstate judgment of February 27, 1973.

Following the above, the Commissioner, as appellant, filed on November 6, 1975 with the Tax Court a notice of appeal from the decision and/or order of October 9, 1975 (Docket No. 75-1919 below) (App. H). On January 19, 1976 (App. I), the Commissioner filed a separate Petition for Writ of Mandamus to Honorable Bruce M. Forrester, Judge, United States Tax Court, seeking an order compelling Judge Forrester to enter decision consistent with mandate of Tenth Circuit filed with Tax Court

on or about November 27, 1974 (Docket No. 76-1021 below). It seems clear that Petition for Writ of Mandamus was an attempt to bypass the appeal procedure. On April 20, 1976, Honorable Bruce M. Forrester mailed his response to Petition for Writ of Mandamus, but made no further appearance.

On April 21, 1976, petitioners as parties below in case of Estate of Leonard E. Whitlock, Deceased, Georgia M. Whitlock, Executrix, and Georgia M. Whitlock v. Commissioner of Internal Revenue, T.C. Docket No. 386-70, and as such being respondents pursuant to Rule 21 (b) Federal Rules of Appellate Procedure, in action for mandamus against Judge Forrester, filed their separate response to Petition for Writ of Mandamus directed to Honorable Bruce M. Forrester, opposing the grant of writ of mandamus (App. J).

On January 11, 1975 Georgia M. Whitlock married John L. Rigg, and is using the name Georgia Whitlock Rigg in matters where the second name assists in identifying her as the former Georgia Whitlock.

The Court of Appeals for the Tenth Circuit dismissed the Commissioner's Appeal in Docket No. 75-1919 and granted the writ of mandamus directed to Judge Bruce M. Forrester, Judge, United States Tax Court in Docket No. 76-1021 on December 13, 1976 (App. B), directing Judge Forrester to enter decision imposing the tax called for by Section 951 (a) IRC 1954. Petitions for rehearing en banc and for recall of mandate were denied on December 29, 1976. Review is sought of both judgments.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Issue 1. Under Rule 21(b) F.R.A.P. (App. L) petitioners herein were true parties at interest in the mandamus action below (Walker v. Columbia Broadcasting System, Inc., 443 F. 2d 33 (7th Cir.), l.c. 34; Rapp v. Van Dusen, 350 F. 2d 806 (USCA-3), l.c. 812-813).

By provisions of Section 7481(a) (3) (B) IRC 1954, (the Internal Revenue Code of 1954 is found in Title 26, U.S. Code), if the prior decision of the Tax Court has been reversed or modified by the United States Court of Appeals, the last decision of the Tax Court becomes final 30 days after the time the said last decision of the Tax Court was rendered, "unless within such 30 days either the Secretary of his delegate or the taxpayer has instituted proceedings to have such decision corrected, so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected."

In the Tax Court below the original decision of the Tax Court (entered February 27, 1973) had been so reversed or modified (albeit incompletely - see 36 CJS Federal Courts, Par. 301(18), page 1347). Taxpayers-petitioners below clearly sought in the Tax Court below to have the original judgment of February 27, 1973 reentered, for reasons stated above (App. E). In response to said effort, the Tax Court, in effect, reentered its original judgment on October 9, 1975, granting taxpayers-petitioners all the relief sought

thereby (see Louisville Builders Supply Co. v. Comm'r, 294 F.2d 333 (USCA-5); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-547, 69 S.Ct. 1221 (USCA-6). As such, in the mandamus action the Comm'r had until November 8, 1975 to file his petition for writ of mandamus (Section 7481(a)(3)(B)(iii) IRC 1954 (App. L.). Since he did not file it until January 19, 1976 at the earliest, his petition for writ of mandamus should have been dismissed (see Crews v. Comm'r, 120 F.2d 749 (USCA-10); Seiberling Rubber Co. v. U.S., 297 F.2d 842).

Further, the writ of mandamus was improvidently ordered because mandamus may not be resorted to for purpose of reviewing an appealable order of the Tax Court (Roche v. Evaporated Milk Association, 391 U.S. 21, 63 S.Ct. 938). The order of the Tax Court dated October 9, 1975, in effect reinstated its judgment of February 27, 1973 and gave petitioners below all the relief they sought in their prior motion of April 8, 1975 (App. E).

Issue 2. In all events, the order to Honorable Bruce M. Forrester, Judge, United States Tax Court, Retired, to impose a federal income tax on petitioners below in Tax Court under Section 951(a) IRC 1954 was unlawful and manifestly unjust by reason of companion excepting Sections 951(c) and (d) IRC 1954 in which Congress has specifically barred the imposition of the tax under the circumstances of this litigation. The reasoning is as follows:

Admittedly Section 951(a) IRC 1954 imposes a tax on shareholders of a controlled

foreign corporation (Oil Services was such a corporation, and Leonard and Georgia or one of them were such shareholders) to extent of investments in U.S. property representing earnings. Oil Services had such earnings accumulated essentially prior to January 1, 1963. This is not the issue. The issue involves the application of companion Subsections 951(c) and (d) IRC 1954 which are specific exceptions to the application of Section 951(a) in cases where the corporation is either: 1. a foreign investment company, or 2. a foreign personal holding company with its shareholders subject to tax under Section 551 (b) IRC 1954 related to foreign personal holding companies. Leonard and or Georgia were found by the Tax Court (59 TC 490) ro be subject to tax under Section 551(b). This is undisputed.

Under both subsections 951(c) and (d) the law plainly, unequivocally and absolutely provides that a "United States shareholder ***** shall not be required to include in gross income, for such taxable year, any amount under subsection (a) with respect to such company." (Emphasis added). Congress has spoken its will. In this situation the law provides that the shareholders in question are excepted from the rules outlined in Section 951(a).

The Commissioner of Internal Revenue in interpreting Section 951(c) performed his duty in Regulation 1.951-2, interpreting Section 951 (c) consistent with the language of their statute. However, in interpreting Section 951(d) he went beyond the terms of the statute and Ruled that the exception to the application of Section 951(a),

established by Congress applied basically only to the earnings and profits for the current year of the controlled foreign corporation, rather than the unlimited exception laid down by the Congress. (Regulation 1.951-3, Example 5 - App. L).

The statute may or may not be symmetrical, this is not the issue. The issue is did Congress mean what it said. The Senate Finance Committee Report indicates that it meant exactly what it said (1962 C.B. 3, page 944). Judge Bruce M. Forrester speaking for 13 Judges of the Tax Court in 59 TC 490, l.c. 501, found that it meant what is said "There is good evidence that in using the language of Section 951(d), Congress fully intended the result required by a straightforward reading of that language." The Report of the Conferees on the Part of the House and Senate, found in 1962 C.B. 3, pages 1129, 1134, 1135 and 1139 makes it clear that the combined House and Senate followed the language and intent of the Senate Finance Committee version related to Section 951(d).

Justice Byron White, speaking for the Supreme Court in Deepsouth Packing Co. v. Laitrman Corp., 406 U.S. 518, 92 S.Ct. 170, l.c. 530, point 12, notes that "When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can only come from Congress."

It is thus clear that the order of the 10th Circuit Court of Appeals was unlawful, in direct violation of the statute, and manifestly unjust for the following reasons:

a. The holding of USCA-10 conflicts with the settled rules of law in this court that, however inclusive the general language of the statute is, it (i.e. the general language) will not be held to apply to a matter specifically dealt with in another part of the same statute (Fourco Glass Co. v. Transmirra Prod. Corp., 353 U.S. 222, 77 S.Ct. 787; Ginsberg & Sons v. Popkin, 285 U.S. 204, 52 S.Ct. 322; Clifford v. MacEvoy Co. v. U.S., 322 U.S. 102, 107, 64 S.Ct. 890; Bulova Watch Co. v. U.S., 365 U.S. 753, 81 S.Ct. 864).

b. Said holding further conflicts with the established rule in this Court that the Commissioner cannot promulgate regulations which impose a tax on taxpayers which has not been imposed by legislative command, nor may the Court, including the Supreme Court, sustain an imposition of such tax (Comm'r v. Acker, 361 U.S. 87, 80 S.Ct. 144; U.S. v. Calamaro, 354 U.S. 351, 77 S. Ct. 1138, points 3 and 7; Deputy v. Dupont, 308 U.S. 488, 60 S.Ct. 363, point 9; Koshland v. Helvering, 298 U.S. 441, 56 S. Ct. 363, point 4; Helvering v. Sabine Transportation Co., 318 U.S. 306, 63 S.Ct. 569, point 2; U.S. v. Merriam, 262 U.S. 179, 44 S. Ct. 7)

c. Said holding further conflicts with the established rule in other Circuit Courts of Appeal and in the same 10th Circuit to the same general effect as the rule noted in b. above, as noted below:

c.1. Other Circuits - Bank of New York v. U.S., 526 F.2d 1012 (USCA-3); Miller v.

Comm'r, 510 F.2d 230 (USCA-9); International Trading Co. v. Comm'r, 484 F.2d 709 (USCA-7); Busse v. Comm'r, 479 F.2d 1147 (USCA-7); Supreme Investment Corp. v. U.S., 468 F.2d 370 (USCA-5); Wetter Mfg. Co. v. U.S., 458 F.2d 1033 (USCA-6).

c.2 Tenth Circuit - Reardon v. U.S., 491 F.2d 822; U.S. v. Empey, 406 F.2d 157, points 5 and 6; U.S. v. Rothenberg, 350 F.2d 319 (cited with approval in Miller v. Comm'r supra; City National Bank of Lawton, Okla. v. U.S., 207 F.2d 741).

Applying these established rules of law in this Court to the statutes involved, Section 951(a) IRC 1954, which the Court of Appeals for the Tenth Circuit has ordered to be applied, is the general statute, and Sections 951(c) and (d) are companion sections which carve out exceptions to application of tax imposed by Section 951(a) IRC 1954. Conditions of Section 951(d) IRC 1954 are met, namely that the United States shareholder be subject to tax under Section 551 (b) (relating to foreign personal holding company income included in the gross income of the United States shareholder). The Tax Court has so found, and there is no dispute on this aspect of the matter. Accordingly, under the plain and unequivocal provisions of Section 951(d), United States shareholders of Oil Services for years 1964, 1965 and 1967 "shall not be required to include in gross income, for such taxable year, any amount under subsection (a) with respect to such company." The law is unequivocally clear which creates the exception, and the Senate Finance Committee Report found

in 1962 C.B. 3, page 944, is in full accord with this interpretation.

On a practical basis, the clarity of the reading of the law demanded by the language of Subsections 951(c) and (d) IRC 1954 is noted in a publication of Price Waterhouse & Company, International Firm of Certified Public Accountants, with offices either directly or through affiliated firms in some 75 or more countries throughout the world, Said firm publishes a series of information guides for those doing business in various countries throughout the world. In its "Information Guide for U.S. Corporations Doing Business Abroad", it discusses (September, 1970 issue) Controlled Foreign Corporations at page 4 and following. At page 6 it notes:

"The shareholder of a controlled foreign corporation which is also a foreign personal holding company (see page 4) will not also be subject to taxation under Subpart F."

This is the precise position taken by petitioners herein and shows clearly how the ordinary person of reasonable business experience reads the statute.

DOCTRINE OF MANIFEST INJUSTICE

The rule of administrative convenience (Messinger v. Anderson, 225 U.S. 426, 32 S. Ct. 739; Naples v. U.S., 359 F.2d 277 (C.A.-Dist. Col.)), applied by the Courts to the effect of an earlier appeal in the same case, is not an

impediment to correction of the former decision in the case of a showing of manifest injustice (Toucey v. New York Life Insurance Company, 112 F.2d 937, (USCA-8), point 1; Greater Boston Television Corporation v. F.C.C., 463 F.2d 268 (USCA-Dist. Col.)). It is submitted that it is manifest injustice to order the imposition of a tax which Congress did not impose, in violation of the separation of powers doctrine. Chief Justice Marshall, in McCulloch v. Maryland, 4 Wheat, 316, 4 L. Ed. 579, long ago noted that: "The power to tax involves the power to destroy." Such power should not be permitted to the Court of Appeals for the Tenth Circuit in the face of the absolute prohibition on the imposition of the tax outlined in companion Sections 951(c) and (d). As Justice Byron White, speaking for the Court in Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 92 S. Ct. 170, l.c. 530, point 12, noted: "When, as here, the Constitution is permissive, the sign of how far Congress has chosen to go can come only from Congress."

ULTIMATE REASONS FOR GRANTING THE WRIT OF CERTIORARI

In essence, this is a case, which if the decision of a panel of the Tenth Circuit Court of Appeals is left to stand, will cause the former spouse of Leonard E. Whitlock, now Georgia Whitlock Rigg, to be stripped of her financial assets. In addition, decision below of the panel is erroneous as a matter of law, and a usurption of the right of Congress to legislate in the manner in which it sees fit. Allowing the decision to stand will be in true reality manifest

injustice, particularly when the case of Lovett v. U.S., Docket No. 191-74 in the Court of Claims (App. K) is expected to find its way to this Court for review, following expected adverse decision to the United States on the so-called Section 951(d) issue in that case.

CONCLUSION

WHEREFORE, petitioners move this Court to grant Writ of Certiorari to the United States Court of Appeals for the Tench Circuit and summarily vacate the judgment in both docket numbered cases, 75-1919 and 76-1021, and remand the case to Tenth Circuit with instructions to hear the Commissioner's appeal in Docket No. 75-1919 in the light of companion excepting subsections 951 (c) and (d) IRC 1954. (See Collins v. Comm'r, 393 U.S. 215, 89 S.Ct. 388 - remanding to Tenth Circuit Court of Appeals on a similar basis).

Respectfully submitted,

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APPENDIX

Filed Dec. 13, 1976

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ESTATE OF LEONARD E. WHITLOCK, etc., et al., Petitioners-Appellees, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.	)	No. 75-1919

PETITION FOR REVIEW OF AN ORDER OF THE TAX COURT

COMMISSIONER OF INTERNAL REVENUE, Petitioner, v. HONORABLE BRUCE M. FORRESTER, JUDGE, UNITED STATES TAX COURT, Respondent.	)	No. 76-1021

PETITION FOR MANDAMUS TO REVIEW ORDER OF TAX COURT

Philip J. Erbacher (Joseph A. Hoskins, R. Eugene McGannon and Hoskins, King, McGannon, Hahn and Hurwitz with him on the brief) for the Petitioners-Appellees in No. 75-1919.

Gary R. Allen (Scott P. Crampton, Asst. Attorney General, and Gilbert E. Andrews, attorney, Tax Division, Department of Justice with him on the brief) for Respondent-Appellant in No. 75-1919 and Petitioner in No. 76-1021.

Honorable Bruce M. Forrester filed a Pro se Response in No. 76-1021.

Before SETH, BREITENSTEIN and BARRETT, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The issue is whether the Tax Court has complied with a mandate of this court. Two cases have been consolidated for submission and disposition. No. 75-1919 is a direct appeal from a Tax Court order. No. 76-1021 is a petition for mandamus seeking relief from the same order. We dismiss the appeal and grant mandamus relief.

The mandate in question was issued in Estate of Whitlock v. Commissioner of Internal Revenue, 10 Cir., 494 F.2d 1297. It affirmed in part and reversed in part a decision of the Tax Court in Estate of Leonard E. Whitlock, 59 T.C. 490. The facts are not in controversy and are detailed in the Tax Court opinion.

The prime issue is the taxation of shareholders of a controlled foreign company which is also a foreign personal holding company.

The Commissioner assessed deficiencies against the taxpayers, shareholders in the foreign company, on the basis that increases in corporate earnings invested in United States property should be included in taxpayers' gross income. The questions arise under the provisions of the Internal Revenue Code relating to controlled foreign corporations, 26 U.S.C. § 951-964. Section 951(d) is of particular concern. As said in our first opinion, 494 F.2d at 1298, that section "seeks to prevent the imposition of double taxation of stockholders when a foreign corporation" is within certain definitions. Also of concern is § 1.951-3, Treas. Reg., 26 C.F.R. § 1.951-3. Example 5 (a) thereunder has a factual situation comparable to that here presented. See 494 F.2d at 1299 and 59 T.C. at 497-498. The regulation, considered with its example, sustains the position of the Commissioner.

The Tax Court upheld the constitutionality of Subpart F - Controlled Foreign Corporations. Section 951 is within Subpart F and we agreed with the Tax Court on this issue. 494 F.2d at 1301. With three judges dissenting, the Tax Court held that the regulation, § 1.951-3, was invalid. We disagreed and upheld the validity of the regulation. Ibid. On the remaining issues which are not pertinent here and which related to the applicable statute of limitations, we agreed with the Tax Court. Ibid. The effect of our decision was to increase the gross income, and the tax liability, of the taxpayers.

We rejected the Taxpayers' suggestion for rehearing en banc and denied their petition for rehearing. The Supreme Court denied certiorari,

Whitlock, Executrix v. Commissioner of Internal Revenue, 419 U.S. 839 and also denied rehearing, 419 U.S. 1041. Our mandate to the Tax Court issued on November 27, 1974. The taxpayers then moved to recall the mandate on the ground of manifest injustice. We declined to consider the motion.

Omitting formal recitals, our mandate read:

> "On consideration whereof, it is ORDERED that the judgment of the Tax Court in both cases is REVERSED as to the application of section 951(d) as described in the text of the opinion, and insofar as it voided Treasury Regulation on Income Tax (1954 Code) § 1.951-3 (Coordination of Subpart F with Foreign Personal Holding Company Provisions). The decision of the Tax Court is otherwise AFFIRMED."

The Tax Court reassigned the case to Judge Forrester who had authored the majority Tax Court opinion found at 59 T.C. 490. On March 25, 1975, Judge Forrester ordered the Tax Court's original decision vacated and set aside. He requested the parties to submit any recomputation, stipulation, or motion, which they wished, pursuant to the mandate. The Commissioner filed his computation of the deficiencies for the years in question. The taxpayers filed a motion requesting that Judge Forrester either reinstate the Tax Court's original decision or decline to enter any decision on the mandate. In the alternative, taxpayers challenged the

accuracy of the Commissioner's computations. After a hearing, Judge Forrester made no reference to, or determination of, the differences between the parties on the computation of tax due. On October 9, 1975, he issued the following order:

> "On March 25, 1975, we entered an Order herein, which inter alia, 'ORDERED that the decision entered by the Court in this case on February 27, 1973 is hereby vacated and set aside.'
>
> It is now
>
> ORDERED that this Court's Order of March 25, 1975 is hereby vacated and set aside."

No. 75-1919 is an appeal by the Commissioner from the October 9, 1975, Tax Court order. No. 76-1021 is a petition by the Commissioner for mandamus relief from the same order. We required responses to the mandamus petition. In his response Judge Forrester said, first, that our mandate "seemed ineffective since, although it was a reversal in part, it did not remand or contain any instructions." Second, he noted the pendency in the Court of Claims of the case of Lovett v. United States, and said that he was unwilling to hold the instant case in abeyance pending the final outcome of the Lovett case. Third, he said that his October 9 order was made "to prevent injustice" in the event that Lovett reached a conclusion contrary to ours in the Whitlock case.

Taxpayers say that our first decision was wrong and results in manifest injustice to them. They argue that regulation § 1.951-3 is contrary to the applicable statute, 26 U.S.C. § 951(d), and hence is invalid. We recognize that the Commissioner may not impose a tax which Congress has not authorized. See Reardon v. United States, 10 Cir., 491 F.2d 822, 824, and United States v. Empey, 10 Cir., 406 F.2d 157, 170. However, we considered the problem in our first decision and held that the regulation did not violate the statute.

Taxpayers persist in their effort to re-argue the issues decided on the former appeal. They make no claim of newly discovered evidence, fraud on the court, or any conduct reflecting on the integrity of the judicial process. Their arguments are essentially the same as those which we rejected. Our decision on the first appeal was not interlocutory. It adjudicated the merits of the controversy and became final when the Supreme Court denied certiorari. There would be no end to a lawsuit if a dissatisfied litigant could by procedural resourcefulness compel a court to listen to criticisms of its opinions or to speculate on the possibility of future contrary decisions. See United States v. Camou, 184 U.S. 572, 574. We will not reconsider the decision which we have made.

The taxpayers have moved that, pursuant to 28 U.S.C. § 1254, we certify to the Supreme Court the issues pertaining to the merits. We decline to do so. See Wisniewski v. United States, 353 U.S. 901. The issues have already

been presented to the Supreme Court on taxpayers' petition for certiorari and the Supreme Court denied certiorari.

Our concern in No. 75-1919, the Commissioner's direct appeal, is whether the Tax Court's October 9, 1975, order is appealable under 26 U.S.C. § 7482(a). That section authorizes the courts of appeals to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Section 1291, 28 U.S.C., gives the courts of appeals jurisdiction to review final decisions of the district courts. For a Tax Court's decision to be reviewable, it must be final.

The October 9 order vacated the Tax Court's March 27 order which in turn vacated the Tax Court's decision which we set aside on the first appeal. Taxpayers urge that the effect of the October 9 order is to reinstate the decision which was before us on the first appeal and which we rejected in part. From this premise they argue that the merits of the controversy are again before us for review. We reject the premise. Nothing in the record intimates, and we will not assume, that the Tax Court intended to disobey our mandate. The October 9 order was interlocutory and was not a final decision appealable under § 7482(a) No. 75-1919, the Commissioner's direct appeal should be dismissed.

Section 7482(a), Title 26 U.S.C., says that a decision of the court of appeals reviewing a decision of the Tax Court is final, subject to review by the Supreme Court on certiorari.

Taxpayers sought certiorari and it was denied. 419 U.S. 839, rehearing denied 419 U.S. 1041. Our mandate issued in due course. The Tax Court was without power to do anything contrary to the letter or spirit of the mandate as construed in the light of the opinion deciding the case. See Thornton v. Carter, 8 Cir., 109 F.2d 316, 320; In re Sanford Fork & Tool Company, 160 U.S. 247, 255; and Cherokee Nation v. State of Oklahoma, 10 Cir., 461 F.2d 674, 677-678, cert. denied 409 U.S. 1039. The rule applies to the Tax Court. See Municipal Bond Corporation v. Commissioner of Internal Revenue, 8 Cir., 382 F.2d 184, 186.

The effect of the October order is to leave this court's mandate unenforced. One reason given for this inaction is that we did not specifically remand the case with directions to enter a new decision in accord with our opinion. This reliance on semantics does not persuade us. The opinion of the appellate court may be consulted to ascertain the intent of the mandate. Cherokee Nation v. State of Oklahoma, 461 F.2d at 678. Our opinion held that the regulation was valid and sustained the Commissioner's assessment of deficiencies based on the inclusion in taxpayer's gross income of increases in corporate earnings invested in United States property. All that remained to be done was the computation of the tax.

The response of Judge Forrester refers to the pending Lovett case in the Court of Claims and to the possibility that Lovett may produce a decision contrary to ours on the first appeal. The pendency of another case involving

a similar issue is of no pertinence. The potential of conflicts among courts of coordinate jurisdiction is not an extraordinary circumstance demanding or requiring our reconsideration of our first opinion.

If the parties deemed the mandate unclear, they could have sought clarification, but they did not do so. If the Tax Court thought the mandate unclear, it could have so stated in its October order, but it did not do so. At the very least the Tax Court could have made a decision which reflected its understanding of the mandate. Again it did not do so. Instead, it has left our mandate unenforced and placed the controversy in a state of limbo.

This brings us to the Commissioner's petition for mandamus. In reference to mandamus, the Supreme Court has recently reiterated the rule that " 'only exceptional circumstances amounting to a judicial "usurpation of power" will justify the invocation of this extraordinary remedy.' " Kerr v. United States District Court, 48 L.Ed. 2d 725, 732. Mandamus is proper when a party has no other adequate means to obtain relief and his right to relief is clear and indisputable. Ibid. at 733. Our denial of appealability of the October 9 order under § 7482(a) leaves the Commissioner's sole remedy that of application for an extraordinary writ under 28 U.S.C. § 1651. See also Rule 21, F.R.A.P. The Tax Court had the duty to obey the mandate but did not do so. Kerr v. United States District Court recognizes that mandamus may be used to compel a court to exercise authority when it has the duty to do so. Ibid at

732. See also Will v. United States, 389 U.S. 90, 95, and Roche v. Evaporated Milk Association, 319 U.S. 21, 26. We have held that mandamus is the proper remedy to enforce compliance with a mandate. Lewis, Roca, Scoville & Beauchamp v. Christenson, 10 Cir., 263 F.2d 536, 537. The Commissioner is entitled to mandamus relief. The Tax Court must comply with our mandate.

The motion for certification of question to the Supreme Court under 28 U.S.C. § 1254 is denied. The Commissioner's direct appeal, No. 75-1919, is dismissed for lack of a final and appealable order. In No. 76-1021 the writ of mandamus is granted. The Tax Court is directed to promptly give effect to our opinion in Estate of Whitlock v. Commissioner of Internal Revenue, 494 F.2d 1297. Specifically this means that the taxpayers' liability shall be determined in accordance with the decision of the Tax Court reported at 59 T.C. 490 except that the gross income for the pertinent years shall be increased by those amounts which must be included therein by reason of our opinion reported at 494 F.2d 1297. The writ shall issue forthwith.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM - December 13, 1976

Before The Honorable Oliver Seth, Circuit Judge, The Honorable Jean S. Breitenstein, Senior Circuit Judge, and The Honorable James E. Barrett, Circuit Judge.

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA M. WHITLOCK, EXECUTRIX, and GEORGIA M. WHITLOCK, Petitioners-Appellees, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.	No, 75-1919 (Tax Court No. 386-70)
COMMISSIONER OF INTERNAL REVENUE, Petitioner, vs. HONORABLE BRUCE M. FORRESTER, Judge, United States Tax Court, Respondent.	No. 76-1021

The captioned appeals were consolidated for submission and disposition. Appeal No. 75-1919 is a direct appeal from a Tax Court order

dated October 9, 1975. Appeal No. 76-1021 is a petition for mandamus seeking relief from the same order. This Court required responses to the mandamus petition and the parties were granted leave to file supplemental citations of authorities with the Court and the causes were then argued by counsel.

Upon consideration whereof, it is ordered that Appeal No. 75-1919 is dismissed. The October 9, 1975, order of the Tax Court was not a final decision appealable under 26 U.S.C. § 7482(a).

The Commissioner in Cause No. 76-1021 is entitled to mandamus relief. It is therefore, the further order of the Court that this writ of mandamus shall issue forthwith and is made absolute ordering the Tax Court to enforce the mandate issued in Estate of Whitlock v. Commission of Internal Revenue, 10th Cir., 494 F.2d 1297, on November 27, 1974. Our decision sustained the Commissioner's assessment of deficiencies based on the inclusion in taxpayers' gross income of increases in corporate earnings invested in United States property. Specifically, this means that the taxpayers' liability shall be determined in accordance with the decision of the Tax Court reported at 59 T.C. 490 except that the gross income for pertinent years shall be increased by those amounts which must be included therein by reason of our opinion reported at 494 F.2d 1297.

/s/ Howard K. Phillips
Clerk

APPENDIX C

NOVEMBER TERM - December 29, 1976

Before The Honorable Oliver Seth, Honorable Jean S. Breitenstein and Honorable James E. Barrett, Circuit Judges

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA WHITLOCK RIGG (FORMERLY GEORGIA M. WHITLOCK), EXECUTRIX, and GEORGIA WHITLOCK RIGG (FORMERLY GEORGIA M. WHITLOCK), Petitioners-Appellees, vs. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.	)	No. 75-1919
COMMISSIONER OF INTERNAL REVENUE, Petitioner, vs. HONORABLE BRUCE M. FORRESTER, Judge, United States Tax Court, Respondent.	)	No. 76-1021

This matter comes on for consideration of of the outstanding motions and petitions heretofore filed with the Court as follows:

1. The appellees' and respondents' petition for rehearing by Court en banc pursuant to Rules 35 and 40 F.R.A.P. filed December 15, 1976.

2. The appellant's petition for rehearing in cause No. 75-1919 and filed December 23, 1976, solely for the purpose of protecting the petition of appellant.

3. Appellees-respondents' motion for recall of mandate pending disposition of petition for rehearing en banc and motion for stay of mandate pending application for certiorari which was filed December 20, 1976.

4. Appellees-respondents' motion for stay of the writ of mandamus issued in cause No. 76-1021 pending application for certiorari which was filed December 20, 1976.

5. Appellees-respondents' motion to have the Court revise its opinion of December 13, 1976 in both appeals No. 75-1919 and No. 76-1021.

The Court has heretofore entered an order to change the name of one of the parties to the captioned appeals. The Court has considered the response of the Commissioner to the motions for recall and stay.

Upon consideration whereof, it is the Order of the Court as follows:

a. The petition for rehearing is denied by Circuit Judge Seth, Senior Circuit Judge Breitenstein and Circuit Judge Barrett to whom

the case was argued and submitted.

The petition for rehearing having been denied by the original panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

b. The appellant's petition for rehearing filed December 23, 1976 solely for the purpose of protecting his position in No. 75-1919 is denied.

c. The motions to recall the mandate in No. 75-1919 and the writ in No. 76-1021 are denied.

d. Motion of petitioners- appellees to stay the mandate in No. 75-1919 is denied.

3. The petitioners-appellees' petition for a stay of the writ of mandamus issued in No. 76-1021 is denied.

f. The petitioner-appellees' motion for revision of the opinion in the captioned appeals is denied.

/a/ Howard K. Phillips
Clerk

APPENDIX D

MARCH TERM - April 22, 1974

Before Honorable David T. Lewis, Chief Judge, Honorable Oliver Seth and Honorable Robert H. McWilliams, Circuit Judges

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA M. WHITLOCK, EXECUTRIX, and GEORGIA M. WHITLOCK, Petitioners-Appellees, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.	)	No. 73-1497

(Cross-Appeal)

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA M. WHITLOCK, EXECUTRIX, and GEORGIA M. WHITLOCK, Petitioners-Appellants, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	)	No. 73-1498

This cause came on to be heard on the record on appeal from the Tax Court of the United

States and was argued by counsel.

On consideration whereof, it is ORDERED that the judgment of the Tax Court in both cases is REVERSED as to the application of section 951 (d) as described in the text of the opinion, and insofar as it voided Treasury Regulation on Income Tax (1954 Code) § 1.951-3 (Coordination of Subpart F with Foreign Personal Holding Company Provisions). The decision of the Tax Court is otherwise AFFIRMED.

/s/ Anne Cabot
Deputy Clerk

APPENDIX E

UNITED STATES TAX COURT

United States Tax Court
Filed
Apr 8, 1975

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA M. WHITLOCK, EXECUTRIX, and GEORGIA M. WHITLOCK, Petitioners, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	No. 386-70

APPENDIX E (Cont.)

MOTION OF PETITIONERS, PURSUANT TO ORDER OF THIS COURT OF MARCH 25, 1975, TO ENTER ITS DECISION CONSISTENT WITH THE PLAIN AND EXPLICIT INSTRUCTIONS OF SECTION 951(d) IRC 1954, OR IN THE ALTERNATIVE TO HOLD THIS MATTER IN ABEYANCE PENDING OUTCOME OF LITIGATION IN LOVETT V. U.S. DOCKET NO. 191-74, COURT OF CLAIMS.

Comes now petitioners, pursuant to order of this Court entered on March 25, 1975, and move the Court, pursuant to the plain and explicit mandate of Section 951(d) IRC 1954 and matching Section 951(c) IRC 1954, to enter its decision that there are deficiencies due from petitioners in the following amounts for the following years:

1965	$6,230.76
1967	$4,131.32

and to further enter its order that there is an overpayment in income tax for the taxable year 1964 in the amount of $2,204.12, which amount was paid: $302.48 on April 15, 1965, $1,370.83 on May 12, 1965, and $530.81 on February 3, 1967, and for which amounts a claim for refund could have been filed under the provisions of Section 6511(c) of the Internal Revenue Code of 1954, on December 30, 1969, the date of the mailing of the notice of deficiency.

* * * * *

Petitioners continue their attack upon the attempts to impose a tax under Section 951(a)

upon the petitioners prohibited by the plain reading of Sections 951(c) and 951(d) IRC 1954 for the reasons that:

(1) There was no remand from the Court of Appeals which authorizes this Tax Court to enter a decision in a different dollar amount for the years 1964, 1965, 1967 than determined in the decision of this Court entered on February 27, 1973,

(2) In all events, neither this Court nor the Court of Appeals has authority to order the imposition of a tax under Section 951(a) IRC 1954, prohibited and barred by the Congress of the United States by the plain reading of the companion Sections 951(c) and (d) IRC 1954.

ALTERNATE REQUEST

In all events, petitioners in this proceeding request the Tax Court of the United States to hold further action on this case in abeyance pending the outcome of the litigation in the United States Court of Claims in Lovett v. U.S., Docket No. 191-74, point 35, where it is anticipated that the Court of Claims will be compelled, by reason of the plain and specific provisions of Section 951 (c) and 951(d) to rule that a taxpayer has no obligation to pay a tax under Section 951(a) by reason of the plain and specific provisions of Sections 951(c) and (d) IRC 1954. Court of Claims decisions may be reviewed by the Supreme Court by one of two methods (Title 28, USC 1255), by writ of certiorari granted on petition of either the United States or the claimant, or by certification of any question of law by the Court of Claims in a

case as to which instructions are desired, upon which certification in the Supreme Court may give binding instructions. It is anticipated that in the event of the expected view in the Court of Claims contrary to the views of the Court of Appeals for the Tenth Circuit that the matter will be transmitted to the Supreme Court of the United States either for instructions or upon certiorari, and it would be manifest injustice to enter a final binding judgment in this case against petitioners pending the outcome of the litigation in Lovett v. U.S., Docket No. 191-74.

/s/ Philip J. Erbacher

/s/ R. Eugene McGannon

APPENDIX F

UNITED STATES TAX COURT

ESTATE OF LEONARD E. WHITLOCK, DECEASED and RELATED PETITIONERS, Petitioner,	)	
vs.	)	DOCKET NO. 386-70
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

LOCATION OF HEARING:	Kansas City, Missouri
DATE:	June 2, 1975
BEFORE:	Honorable Darrell D. Wiles
APPEARANCES:	Philip J. Erbacher Attorney for Petitioners
	Edward G. Lavery Attorney for Respondent

PROCEEDINGS

THE CLERK: Docket 386-70, Estate of Leonard E. Whitlock, Deceased, and related petitioners.

MR. ERBACHER: Philip J. Erbacher, as originally appearing for the petitioners in this matter.

MR. LAVERY: Edward G. Lavery for the Respondent, Your Honor.

THE COURT: Yes, gentlemen?

MR. ERBACHER: I'd like to point out to the Court at the outset that my remarks are directed both in support of the petitioner's motion filed on or about April 8, 1975, requesting the Court to enter its decision consistent with its

decision of February 27, 1973, or, in the alternative, to hold the matter in abeyance pending the outcome of the litigation in Lovett, L-o-v-e-t-t v. U.S. Docket No. 191-74, in the Court of Claims. Both our original motion and our objections to respondent's computation for entry of decision are supported by the same general factual and legal arguments. Now, retracing the situation for the purpose of this motion, on February 27, 1973, this Court entered its decision in the case. The decision being consistent with the first part of the motion now pending before the Court of April 8, relating to the years 1964, 1965 and 1967. A copy of this decision was attached to the motion. The decision entered on February 27, 1973 states in part, quote,

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APPENDIX G

UNITED STATES TAX COURT
Washington

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA M. WHITLOCK, EXECUTRIX AND GEORGIA M. WHITLOCK, Petitioner,	)	Docket No. 386-70
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER

On March 25, 1975, we entered an Order herein which, inter alia, "ORDERED that the decision entered by the Court in this case on February 27, 1973 is hereby vacated and set aside."

It is now

ORDERED that this Court's Order of March 25, 1975 is hereby vacated and set aside.

/s/ Bruce M. Forrester
Judge

Dated: Washington, D.C.
October 9, 1975

APPENDIX H

UNITED STATES TAX COURT

United States Tax Court Filed Nov. 6, 1975

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA M. WHITLOCK, EXECUTRIX, and GEORGIA M. WHITLOCK, Petitioners-Appellees,	)	Docket No. 386-70
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellant.	)	

NOTICE OF APPEAL

Notice is hereby given that the Commissioner of Internal Revenue hereby appeals to the United States Court of Appeals for the Tenth Circuit from the decision, and/or order, of this Court, entered or reentered in the above-captioned proceeding on the ninth day of October, 1975.

/s/ Scott P. Crampton
Assistant Attorney General
Department of Justice

/s/ Meade Whitaker
Chief Counsel
Internal Revenue Service

APPENDIX H (Cont.)

UNITED STATES TAX COURT
WASHINGTON

ESTATE OF LEONARD E. WHITLOCK, DECEASED, GEORGIA M. WHITLOCK, EXECUTRIX, and GEORGIA M. WHITLOCK, Petitioner(s),	)	Docket No(s). 386-70
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

NOTICE OF FILING NOTICE OF APPEAL

TO: Messrs. Joseph A. Hoskins
R. Eugene McGannon and Philip J. Erbacher
Hoskins, King, Springer, McGannon & Hahn
1100 Commerce Trust Building
Kansas City, Missouri 64106

You are hereby notified that the Respondent on November 6, 1975 filed with the Clerk of the United States Tax Court, at Washington, D.C., a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit, of the decision(s) of the United States Tax Court entered in the above-entitled case(s).

A copy of the indicated document as filed is hereto attached and served upon you.

/a/ Chas. S. Casazza
Clerk of the Court

DATED: November 10, 1975

APPENDIX I

January 19, 1976

SPC:GEA:GRAllen:mae
5-12814

Howard K. Phillips, Esquire
Clerk, U.S. Court of Appeals
for The Tenth Circuit
Room 469, U.S. Courthouse Building
19th & Stout Streets
Denver, Colorado 80202

Re: (1) Estate of Leonard E. Whitlock, etc. et al. v. Commissioner (C.A. 10, No. 75-1919)

(2) Commissioner v. Hon. Bruce M. Forrester, Judge, United States Tax Court (C.A. 10, No.)

Dear Mr. Phillips:

Pursuant to the provisions of Rule 21 of the Federal Rules of Appellate Procedure, we enclose for filing in your Court an original and three copies of a petition for a writ of mandamus on behalf of the Commissioner in the second of the above-entitled cases. We also enclose an original and three copies each of (1) a motion to consolidate the appeal and the petition in the above-entitled cases for the purpose of decision in this Court and (2) a motion to defer the filing of briefs on the appeal pending disposition of the petition and the Court's determination as to whether summary disposition of the appeal may then be appropriate in light of the action which may be taken on the petition. As indicated by the certificates of service attached to the petition and both motions, copies of each of them have been forwarded this date to the named respondent on the petition for a writ of mandamus, and to counsel for the taxpayers who are appellees on the appeal and who are deemed respondents on the petition by virtue of the provisions of Rule 21(b) of the Federal Rules of Appellate Procedure.

Sincerely yours,

SCOTT P. CRAMPTON
Assistant Attorney General
Tax Division

By Gilbert E. Andrews
Chief, Appellate Section

cc: Hon. Bruce M. Forrester
Judge, United States Tax Court
400 2nd Street, N.W.
Washington, D.C. 20217

Philip J. Erbacher, Esquire
R. Eugene McGannon, Esquire
1100 Commerce Bank Building
Kansas City, Missouri 64106

APPENDIX J

Law Offices of
HOSKINS, KING, McGANNON,
HAHN AND HURWITZ
Kansas City, Missouri

United States
Court of
Appeals
Tenth Circuit
Filed
Apr 21, 1976

April 19, 1976

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Mr. Howard K. Phillips, Clerk
U.S. Court of Appeals for the Tenth Circuit
Room 469, U.S. Courthouse Building
Denver, Colorado 80202

Re: Comm'r v. Hon. Bruce M. Forrester
Judge, United States Tax Court:
Petition for Writ of Mandamus -
Writ of Mandamus - Docket No.
76-1021

Dear Mr. Phillips:

Enclosed you will find original and three copies of Response under Rule 21(b) F. R. A. P., on behalf of parties named below in Tax Court Docket No. 386-70, as Respondents under Rule 21(b) F. R. A. P. to Petition for Writ of Mandamus filed in Docket No. 76-1021.

Please file these papers in the Court file and transmit to the Court for action.

Please acknowledge receipt of this letter by placing your date received stamp on extra copy hereof attached and returning it to us for our case file. Self-addressed, stamped envelope is enclosed for reply. Thank you.

Yours very truly,

/s/ Philip J. Erbacher

PJE:nej
Enclosures
cc: Mr. Scott P. Crampton,
Assistant Attorney General
cc: Mr. Meade Whitaker, Chief Counsel
cc: Hon. Bruce M. Forrester, Judge
United States Tax Court

APPENDIX K

Law Offices
COHEN AND URETZ
1775 K Street, N. W.
Washington, D. C. 20006

September 26, 1976

Philip J. Erbacher, Esquire
Hoskins, King, McGannon, Hahn
& Hurwitz
Suite 1100 Commerce Bank Building
922 Walnut Street
Kansas City, Missouri 64106

Re: W. R. Lovett v. United States
Ct. Cl. - Docket No. 191-74

Dear Mr. Erbacher:

During our telephone conversation of September 27, 1976, you advised me that in the course of oral argument before the United States Court of Appeals for the Tenth Circuit, in the Whitlock case, Judge James E. Barrett inquired as to the present status of the case of Lovett v. United States, U. S. Court of Claims, Docket Number 191-74. As you are aware, our firm is counsel of record to the Plaintiff in the Lovett case.

At the present time, the case is at issue and discovery procedures have commenced. The Lovett case involves one issue which is identical to the issue presented in the Whitlock case involving the interpretation of section 951(d) of the

Internal Revenue Code of 1954. There are other unrelated issues. It is only with respect to these latter issues that discovery has been undertaken by the parties since there appears to be no material disputed issue of fact involved in the section 951(d) issue.

Settlement negotiations between the parties are in progress. Although the timing and result of these negotiations cannot be predicted with certainty, it is my belief that settlement agreement with respect to both issues will be consummated, it at all, before the end of this year.

In the event the section 951(d) issue is not disposed of by settlement, I further believe that the issue will be submitted to the Court for decision at or about that time by filing of a motion for summary judgment on behalf of the Plaintiff.

Very truly yours,

/s/ Stuart E. Seigel

APPENDIX L

Constitutional Provision, Statutes and Regulations
To Extent Not Set Out in Statement

CONSTITUTIONAL PROVISION

Article 1, Section 8, Clause 1 of the United States Constitution reads in part:

"The Congress shall have power to lay and collect taxes. * * *"

INTERNAL REVENUE CODE

Internal Revenue Code of 1954 is found in Title 26, U.S. Code. Pertinent sections are listed below:

Section 551(b) reads:

"Amount Included in Gross Income. - Each United States shareholder who was a shareholder on the day in the taxable year of the company which was the last day on which a United States group (as defined in section 552(a)(2)) existed with respect to the company, shall include in his gross income, as a dividend, for the taxable year in which or with which the taxable year of the company ends, the amount he would have received as a dividend (determined as if any distribution in liquidation actually made in such taxable year had not been made) if on such last day there had been distributed by the company, and received by the shareholders, an amount which bears the same ratio to the undistributed foreign personal holding company income of the company for the taxable year as the portion of such taxable year up to and including such last day bears to the entire taxable year."

Section 951(a)(1) (pertinent parts) reads:

"In General - If a foreign corporation is a controlled foreign corporation for an uninterrupted period of 30 days or more during any taxable year beginning after

December 31, 1962, every person who is a United States shareholder (as defined in subsection (b)) of such corporation and who owns (within the meaning of section 958(a)) stock in such corporation on the last day, in such year, on which such corporation is a controlled foreign corporation shall include in his gross income, for his taxable year in which or within which such taxable year of the corporation ends -

"(A) the sum of -

* * * * *

"(B) his pro rata share (determined under section 956(a) (2)) of the corporation's increase in earnings invested in United States property for such year (but only to the extent not included from gross income under section 959(a)(2))."

Section 7481(a)(3)(B)(iii) (pertinent part) reads:

"(B) Upon Mandate of the Court of Appeals. - If the decision of the Tax Court is modified or reversed by the United States Court of Appeals, and if -

* * * * *

"(ii) the petition for certiorari has been denied, or

"(iii) * * *, then the decision of the

Tax Court rendered in accordance with the mandate of the United States Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Tax Court was rendered, unless within such 30 days either the Secretary or his delegate or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Tax Court shall become final when so corrected."

MISCELLANEOUS

Regulation Sec. 1.951-3, 26 CFR, reads in part as follows:

"Coordination of subpart F with foreign personal holding company provisions.

"A United States shareholder (as defined in section 951(b)) who is required under section 551(b) to include in his gross income for his taxable year his share of the undistributed foreign personal holding company income for the taxable year of a foreign personal holding company (as defined in section 552) which for that taxable year is a controlled foreign corporation (as defined in section 957) shall not be required to include in his gross income for his taxable year under section 951(a) and paragraph (a) of Sec. 1.951-1 any amount attributable to the earnings and profits of such corporation for that taxable year of

such corporation. If a foreign corporation is both a foreign personal holding company and a controlled foreign corporation for the same period which is only a part of its taxable year, then, for purposes of applying the immediately preceding sentence, such corporation shall be deemed to be, for such part of such year, a foreign personal holding company and not a controlled foreign corporation and the earnings and profits of such corporation for the taxable year shall be deemed to be that amount which bears the same ratio to its earnings and profits for the taxable year as such part of the taxable year bears to the entire taxable year. The application of this section may be illustrated by the following examples:"

Example 5(a) under the preceding Regulation and which involves a corporation with undistributed foreign personal holding company income of $2,000.00 reads:

> "Example (5). (a) The facts are the same as in paragraph (a) of example (4), except that, instead of having a $25,000 decrease in qualified investments in less developed countries for 1966, P Corporation invests $20,000 in tangible property (not described in section 956(b)(2)) located in the United States and such investment constitutes an increase (determined under section 956(a) but without regard to the earnings and profits of P Corporation for 1966) in earnings invested in United States property.

> Corporation P's earnings and profits accumulated for 1963, 1964 and 1965 and determined under paragraph (b)(1) of Sec. 1.956-1 are $22,000. The result is the same as in paragraph (a) of example (4), except that instead of including the $25,000 withdrawal, A must include $20,000 in his gross income for 1966 under section 951(a)(1)(B) and paragraph (a)(3) of Sec. 1.951-1 as an investment of earnings in United States property."

Rule 21(b) F.R.A.P., 28 U.S.C., reads in part:

> "***** All parties below other than the petitioner shall also be deemed respondents. *****."